No. 20068

United States
COURT OF APPEALS
for the Ninth Circuit

JIM GARVISON, G. E. CHINN, W. DON CAWOOD, CECIL SEAVEY, W. T. BOYD, H. C. RADATZ, CLIFFORD E. HINES and ROBERT E. DAVIS, TRUSTEES OF OREGON AND SOUTHWEST WASHINGTON PAINTERS PENSION TRUST FUND; E. W. SHIELDS, FRED PETERSON, EARL DILTS, JACK ROPER, W. T. BOYD, H. C. RADATZ, CLIFFORD E. HINES and ROBERT E. DAVIS, TRUSTEES OF OREGON AND SOUTHWEST WASHINGTON PAINTERS MEDICAL-HOSPITALIZATION TRUST FUND; PORTLAND AREA PAINTERS AND DECORATORS JOINT COMMITTEE, INC., a non-profit Oregon corporation; and LOCAL NO. 10 OF THE BROTHERHOOD OF PAINTERS, DECORATORS & PAPERHANGERS OF AMERICA,

Appellants,

v.

NORMAN A. JENSEN,

Appellee.

APPELLEE'S BRIEF

Appeal from the United States District Court for the District of Oregon

HONORABLE JOHN F. KILKENNY, Judge

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Argument:

I. The provisions of the trust indentures providing for coverage and participation by Union officers and employees in an industry Pension Trust and Medical Trust is prohibited by Section 302 of the Labor Management Relations Act of 1947 17

II. The District Court did not err in finding:

(1) that the practice of extending certain benefits to retired employees by the Trustees of the Medical Trust violated the Act, and 27

(2) that the benefits presently paid to retirees are provided for by extra assessments now being paid by employers 27

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and the Declaratory Judgment Act, 28 U.S.C.A. 2201. This court has jurisdiction under 28 U.S.C.A. 1291.

STATEMENT OF THE CASE

Appellee cannot accept the proposition that this case involves two typical trusts and that all this court has to decide is the abstract question of (a) whether it is permissible under Section 302 of the Labor Management Relations Act for a labor union to provide coverage for its employees by making payments to a jointly administered medical trust and to a pension trust; and (b) whether it is permissible for a medical trust to provide medical benefits for retired employees who were beneficiaries of the plan prior to retirement. We do not believe that the problem is that simple but that a detailed examination of the facts and documentary evidence is necessary. Hereafter in this brief plaintiff's exhibits will be referred to as "Ex. —", defendants' exhibits as "Defend. Ex. —," and the collective bargaining agreement, plaintiff's Ex. 1, as the "contract" and the page numbers of exhibits will be inclusive.

Factual Background and Discussion of Pertinent Documents

The basic instrument in this controversy is the Contract, Ex. 1., which is an agreement entered into by "chapters" representing members as employers and "unions" representing members as employees." In addition individual painting contractors not members of any chapter, hereinafter referred to as "non-member

signatories" and so referred to in Ex. 1, could become parties to the Contract by proper application to the appropriate local joint committee and by signing a document agreeing to be bound by all the terms thereof. The procedure to be followed is set forth in Ex. 1, Article X, pp. 35-36. Plaintiff was not a member of any chapter and became bound by the Contract by executing the appropriate document, Defend. Ex. 14a and 14b, dated February 19, 1962. It should be noted that at the time plaintiff executed Defend. Ex. 14a and 14b the two trust indentures had not been formulated and that plaintiff was not a member of any chapter.

Ex. 1 is one of a series of collective bargaining agreements between the same parties and clearly indicates that it was executed for the sole purpose of establishing the working relationship between employers and their employees and not for the benefit of the Unions and their officers.

"PURPOSE

The purposes of this Agreement are to establish harmonious relations and uniform conditions of employment and a Medical-Hospital Plan and Pension Plan between the parties hereto, to promote the settlement of labor disagreements by conference and arbitration, to prevent strikes and lockouts, to utilize more fully the facilities of the Apprenticeship Training and Promotion Program.

"To Promote efficiency and economy in the performance of Painting and Decorating work, to formulate and establish Joint Committees as directed under Article IX in this Agreement, and generally to encourage a spirit of helpful coopera-

tion between the Employer and Employee groups to their mutual advantage and the protection of the investing public." Ex. 1, p. 3.

Further:

"The term 'Employer' shall be defined to mean any individual, firm, co-partnership, or corporation whose principal business is that of painting and decorating or drywall application and who shall employ at least one journeyman and who shall at all times maintain a permanent address as a principal place of business." Ex. 1, Article II, p. 4.

Besides the usual provisions for wage and working conditions Ex. 1 provides by Article VIII for certain "Fringe Benefits": a Medical-Hospitalization Plan, Section 1, p. 27, and a Pension Plan, Section 2, p. 28, both of which trusts, when formulated, are incorporated into Ex. 1 by reference.

The Medical-Hospitalization Plan requires each employer to pay a certain sum per hour per man into a trust. The Pension Plan provides that every employer "as defined herein" is obligated to pay a certain sum per hour per man into the trust. The third paragraph provides for deposit into escrow of the agreed contributions, the terms of the trust not having been agreed upon at the time Ex. 1 was formulated.

In addition to providing certain fringe benefits, the Contract provided for the formation of local joint committees (Ex. 1, Article IX, pp. 30-35). Local joint committees, of which defendant Portland Area Joint Com-

mittee is the joint committee having territorial jurisdiction in the geographic area in which plaintiff operated his business, consisted of six members, three representing the employers and three representing the Unions. Expenses were to be borne equally but actually all funds were provided by the employers and were derived from the issuance of shop cards, Agreed Facts, par. 7, p. 4, R. 60. Besides providing the machinery whereby employers not members of Chapters could become parties to the Contract as hereinbefore explained, one of the functions of joint committees was to provide funds for the enforcement of "this Contract" and "the amount incurred for legal fees and expenses in connection with the above matters . . . as well as the cost and expenses of any disciplinary committee in connection with the administration of this Agreement, and for such other expenses as may be incurred in connection with causing the observance of this Agreement by the parties hereto," (Ex. 1, pp. 30-31). Thus the local joint committee was the vehicle designated for enforcing the provisions of the Contract, including the Pension and the Medical Trusts. The provisions of this Contract providing for the formation of a Medical Trust specifically charge the local joint committee "with the responsibility of carrying out the enforcement of contributions," Ex. 1, Article VII, last full paragraph, p. 27. Further, the joint committee was authorized to settle local disputes and grievances and to discipline the employers and the members of the Unions.

In addition the local joint committee was charged with the duty of issuing certain "official identification

2 was finally executed, employers and the Unions were at loggerheads over the question of business reprentatives participating in the Pension Trust, the negotiators being H. C. Radatz and W. T. Boyd of Local 10, Clifford E. Hines of Local 360, and Robert E. Davis of 1277, all business representatives, with Roy C. Hill in the background (Tr. 20-26). According to Lowell A. Brown, the coverage of business representatives was resisted by the employers because not agreed to under Ex. 1 and because of illegality, and insisted on by Roy C. Hill. It is clear that the Union negotiators were only interested in allowing business representatives to participate.

From January 22, 1962 until the trust was finally set up on December 15, 1962, contributions agreed to be made by the employers were deposited under an escrow agreement with the United States National Bank. On August 6, 1962, on the refusal of Lowell A. Brown to provide forms on which the Unions could make deposits into the escrow, Local 10 secured a regular employer remittance form and made a retroactive deposit into the escrow for six months, Ex. 28aa (Tr. 30-34). This was followed by retroactive deposit by Local 360, Ex. 29w on August 20, and by retroactive deposit by Local 1277, Ex. 31-u on August 23d (Tr. 34-35). Local 724 did not contribute to the Pension Trust until September, 11, 1963, when Ralph V. Allison became business representative, Ex. 30-l and 30-m, because Roy C. Hill refused to allow Don Lange, business representative, to participate (Tr. 49-50). Local 1902 did not begin to contribute until March 16, 1963, when Roy

J. Dell became business representative and made retroactive contributions for the period from December 1, 1962 through February 28, 1963, Ex. 32-k to 32-m.

Since Locals 10, 360, 1277 and 1902 were making payments into the escrow along with the employers and this condition could continue indefinitely because of the adamant position of the business representatives, the employers capitulated and the Pension Trust indenture was executed December 15, 1962 (Tr. 34-37).

For the period from January 22, 1962, when Exhibit A became effective, to date all contributions made by the participating Unions into the Pension Trust, with minor exceptions, some explained and some unexplained, were for the benefit of the business representatives of the participating Unions and in addition Local 10 made contributions for the benefit of Robert E. Lewis, Financial Secretary. All of these participants were officers of the Union (Ex. 45 and 46). No formal notice of election by the Unions to cover any specific person was ever given to the trustees by the Union, the monthly reports showing contributions for specifically named individuals being deemed sufficient. The rules and regulations for the Pension Plan, Ex. 3, provide for pensions beginning January 1, 1965. Employees of the Unions and employees of employers had the same rights both as to past service credit and contributory service credit. Otherwise the document is unimportant.

The Medical Trust, Ex. 4

A Medical Trust had been in existence since May 13, 1953, see preamble Ex. 4, p. 1. Unions were given the right to elect to cover their "officers, representatives and employees" on the same terms as regular employees under the "Amended Memorandum to Trust Agreement" dated March 20, 1957. See Defend, Ex. 8, Amended Memorandum to Trust Agreement, p. 2, so that employees of Unions were being covered by a Medical Trust on January 22, 1962, and even though the Medical Trust, Ex. 4, was not executed until December 15, 1962, no administrative problems arose, since the Unions continued to make payments to the existing trustees for their employees at the fixed rate of $13.50 per employee per month, and the employers continued to make payments to the existing trustees but at the increased rate per man per hour of 12c as provided by Ex. 1.

While the legality of covering Union employees under the Medical Trust was questioned by the employers, it would appear that the main controversy was over the coverage of business representatives of the Unions under the Pension Trust, probably because Union employees were being covered under the existing trust. In any event both trust documents were agreed upon December 15, 1962.

The present Medical Trust provides coverage for two categories of employees, namely:

> "Section 2. EMPLOYEE. The term 'employee' as used herein shall mean any painter, decorator,

drywall taper or paperhanger who is represented by the Union as defined herein and is employed by an employer as defined herein.

Section 3. ASSOCIATE EMPLOYEES. The term 'associate employees' shall mean employees of the Union and employees of employers who are outside the bargaining unit represented by the Union and whom the Union or employer elects to cover under this trust fund on a uniform non-selective basis, as determined by the Trustees. Associate employees shall also include employees represented by the Union that are employed by federal, state and municipal governments or agencies or subdivisions thereof." Ex. 4, Article I, Sections 2 and 3, p. 2.

The first category, "employee," covers all painters, paperhangers, etc. actually doing the manual work, there being various types of employers. Irrespective of type of employer, all these employers paid into the trust fund at the rate of 12¢ per hour per man during 1962 and 1963 and 15¢ per hour during 1964. This was a contractual obligation prescribed by Ex. 1. As to category two, "Associate Employees," employees of Unions and employees of employers outside the bargaining unit such as clerical help, etc., coverage was at the whim of the Union and the employer. The Union and the employer had no contractual obligation whatsoever to provide coverage for this class of employee and each had the right to elect just what employees should be covered, the only limitation being that they must be within the definition of "Associate Employee."

Ex. 4 provides for a different scale of payment for associate employees from the rate per hour fixed by Ex. 1, namely:

> "(i) Enter into contracts or procure insurance policies . . ., and to terminate, modify or renew any such contracts or policies and to exercise and claim all rights and benefits granted to the Trustees or the fund by any such contracts or policies. Any such contract may be executed in the name of the fund, and any such policy may be procured in such name.
>
> (j) Establish and fix a monthly amount to be contributed to the fund for and on behalf of 'associate employees'. Such amount shall be commensurate with the insurance premium charged to provide insurance coverage for employees within the bargaining unit. The Union, however, may elect to make payments on an hourly basis in the same amounts as provided by the collective bargaining agreement for those employees who occupy positions in which they directly participate in the furtherance of the business of the Union, as distinguished from clerical or stenographic employees." Ex. 4, Article III, Section 1 (i) and (j), pp. 6-7.

Thus, the Unions, besides having the option as to what officers and employees should be covered, also had the option of covering their employees either on a flat fee $13.50 per month during 1962, or at the employer rate, 12¢ per hour per man during 1962, except that as to clerical help coverage must be at the flat fee rate.

Locals 10 and 360 elected to cover their officers,

treasurer, and business representative at the flat fee rate, Ex. 7a-cc and Ex. 8a-cc.

Locals 724 and 1902 elected to cover their business representatives on a per hour basis, Ex. 9a-m and 11-a-n.

Local 1207 first elected to cover its business representative on a per hour basis and then on March 8, 1963 shifted to a flat fee, Ex. 10a-cc.

On the basis of 180 hours per man per month payments on a per hour basis would amount to $21.60 per month as against a flat fee of $13.50. This disparity became larger in 1964 when the rate advanced to 15¢ per hour. According to Joseph H. Herrle there was an advantage to the beneficiary if payments were made on an hourly basis as the beneficiary would have automatic coverage for six months if his employment was terminated. Joseph H. Herrle further testified that the flat fee per month payments generally covered the insurance cost, although occasionally there was a lag in raising the flat fee contribution to equal increased premium charge.

As disclosed by Ex. 7a-7cc, 8a-cc, 9a-n, 10a-r and 11a-n, contributions were made to the Medical Trust by the same Unions and on behalf of the same people as were made by these Unions to the Pension Trust, except that Local 10 contributed to the Medical Trust for the benefit of Thelma Corson, Jean Taylor and Patricia Nelson, stenographers, and likewise contributed for the benefit of Roy C. Hill from May 1, 1962 through October, 1963, Ex. 7a-7u, even though his employment by Local 10 was terminated June 1, 1962.

Coverage for Retired Employees and their Wives under the Medical Trust

The present industry contract, Ex. 1 and its two predecessors, Defend. Ex. 4 and 3, in providing for the creation of a medical trust made no reference to coverage for retired employees. The claim by appellants of the right to cover retired employees is based on a resolution of the trustees dated January 15, 1958, Defend. Ex. 7, wherein retired employees were to be given the identical coverage provided for working members. This resolution was subject to *ratification* by the local Unions and the employers' association. There is no evidence of such ratification but on June 1, 1958, a rider was attached to the existing insurance policy which was signed by six of the eight trustees, Defend. Ex. 24. While the resolution, Defend. Ex. 7, provided that retired employees were to be given the identical coverage provided for working members, the coverage actually provided for these retirees was less extensive than that provided for working employees.

As heretofore pointed out, the Medical Trust Agreement, Ex. 4, was not agreed upon until December 15, 1962, and makes absolutely no reference to coverage for retirees. During the period from April 15, 1962 to December 15, 1962, while the Medical Trust indenture was being negotiated, there was no discussion between the employers and employees as to coverage for retirees and in fact Lowell A. Brown and at least one of the then existing trustees representing the employers, William E. Walker, did not know that the retirees were actually being covered. While Ex. 4 purports to be an

amendment to the previous trust indenture, it was complete in itself and would supersede all resolutions such as the resolution of January 15, 1958, Defend. Ex. 7, so that there is absolutely no basis for present coverage of retirees.

Appellee raised this point of lack of authority in the Pretrial Order, Plaintiff's Contentions 3, p. 5, R. 60, as follows:

> "3. That, contrary to the provisions of the Contract (Plaintiff's Exhibit 1) and the Medical Trust Indenture (Plaintiff's Exhibit 4), the Medical Trust is providing certain medical benefits for retired painters and their dependents who meet the qualifications outlined in the Hospital-Medical Plan (Plaintiff's Exhibit 5) . . . "

Since the resolution of January 15, 1958 was never ratified by any Union or by any Chapter the execution by six of the eight trustees of the insurance rider providing limited coverage for retirees effective June 1, 1958, Defend. Ex. 24, was wholly unauthorized and null and void. Further, even if the resolution of January 15, 1958 had been ratified as required, the Contract, Ex. 1, formulated approximately April 15, 1962, and the Medical Trust Indenture, executed December 15, 1962, would supersede and render nugatory all resolutions of the trustees and plans promulgated by the Administrator that were inconsistent therewith. A reference to the Medical Trust Indenture, Ex. 4, Sections 3 and 4, p. 2, shows that it provides coverage for two definite classes of employees, neither of which could possibly include the retirees.

The trial court could have and this court could well stop here and hold the practice of providing coverage for retirees void for lack of authority. We believe that if this court proceeds to express an opinion on the abstract question of whether coverage is permissible for retirees under a Medical Trust it will in effect be determining a moot question.

Admittedly the trial court did not pass on the question of authority but it likewise did not pass on the broad abstract issue discussed by appellants and the various amici curiae in their briefs, but, as we shall point out later in this brief, based his opinion on a very narrow factual finding, which may explain the failure to rule on the question of lack of authority raised by appellee at the trial.

General Approach

With reference to active Union employees participating in trusts we have three District Judges: Roy W. Harper, Chief Judge of E. D. Missouri E. D., Eighth Circuit, in *Kroger* v. *Blassie,* 225 F. Supp. 300, and *Local No.* 688 v. *Townsend,* 229 F. Supp. 417; Dudley B. Bonsal, S. D. New York, Second Circuit, in *United States Trucking Corporation* v. *Strong,* 299 F. Supp. 937; and John F. Kilkenny, District of Oregon, holding that such participation is illegal. On the other hand we have three Circuit Judges of the Eighth Circuit: Marion C. Matthes, Harry A. Blackman, and Albert A. Ridge, holding to the contrary, 345 F(2)58 and 345 F(2)77. On participation in a medical trust by retirees *United States Trucking Corporation* does not deal with

the subject and the ruling of Judge Kilkenny was limited to a particular situation—otherwise the divergence of opinion is the same.

The Circuit Judges in *Blassie* v. *Kroger,* 345 F.2d 58, say that they prefer "to approach our present task with a construction policy favoring inclusion and benefits where there is no positive statutory language or inference of exclusion, rather than one favoring exclusion and a denial of benefits where there is no positive language of inclusion," thus totally disregarding the decisions of the Supreme Court and the plain language of the statute and totally ignoring the holdings, particularly in the Ninth Circuit, that the trustees are "representatives" of the employees. We believe that this court should interpret the statute, since there is no ambiguity, in accordance with its plain English meaning as illustrated by decisions of the Supreme Court and this court.

The first two specifications of error, 1 and 2, deal with the legality of the Unions providing coverage for their officers and other employees under a medical and a pension trust and are dealt with under one heading by appellants. We shall do likewise, taking the negative of their Summary of Argument.

I
ARGUMENT

Section 302 of the Labor Management Relations Act of 1947, 29 USCA 186, prohibits any employer from paying or any representative of any employees from

receiving money or things of value except under certain circumstances, subsection (c), of which the first four provisions are not pertinent to this inquiry. Subsection (c)(5) contains the exceptions which appellants contend and appellee denies allow Unions to contribute for their officers and employees. The controlling language is:

"(a) It shall be unlawful for any employer . . . to pay . . . money . . .

(1) To any representative of any of his employees who are employed in an industry affecting commerce . . . .

* * * * *

(c) The provisions of this section shall not be applicable . . .

(5) with respect to money or other thing of value paid to a trust fund established by such representative for the *sole and exclusive benefit of the employees of such employer,* and their families and dependants (or of *such* employees, families and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed

> basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon . . . . "

In *Blassie* v. *Kroger,* supra, the circuit court, in dealing with a medical trust, simply held that there was nothing in the statute that would bar participation "of genuine non-officer employees of the Union and that this agreements coverage of the employees is not improper" and then went on to say that coverage for officers if on no better basis than afforded others would not be improper. Assuming that a pension trust was involved, the ruling would undoubtedly be the same. Now in the instant case who are the participants in the Pension Trust? As far as defendant Local 10 is concerned the participants were the four business representatives and the financial secretary, all officers of the local, and two journeymen when they attended a Union covention. As far as the other Unions are concerned it was the business representatives and some minor unexplained coverage for other individuals. As far as the medical trust is concerned the same people were covered and in addition from time to time three stenographers were covered by Local 10. Just who are the representatives of the industry employees and who are the representatives of the Union employees in the administration of the two trusts? It is the business

representatives, officers of the Unions, who negotiated the terms of the two trusts for their own personal benefit and these same four business representatives ended up as employee trustees under both trusts. Further, under the Pension Trust the determination as to who should participate was not only decided by the Union but was restricted to those who participated in the "furtherance of the business of the Union . . . as distinguished from clerical and stenographic employees." Under the Medical Trust coverage likewise depended wholly on the whim of the Union and in actual practice we find the same coverage as in the Pension Trust for officers and coverage by Local 10 of three stenographers. Would the Eighth Circuit under this set of facts find that the trusts were not in conflict with the Act?

The brief of appellants and particularly the briefs of the various amici curiae make intensive reference to Congressional debate and the Internal Revenue Code and regulations thereunder. We say once and for all that so far as participation in either trust by officers of the Unions is concerned, such reference has no bearing on our problem. Nowhere in any debate can we find any reference to coverage for Union officers and it would come as a distinct shock to the Congressmen who enacted the original Act in 1947 to learn that they had created a law which would allow Union officers acting as representatives of the employees of the industry in question to negotiate trusts in which they were the main beneficiaries so far as the Unions were concerned and then acting as trustees for themselves.

Moreover, the comfort that the Eighth Circuit takes in the Internal Revenue Code, Section 165(a)(3) B and (4) of the 1939 Code and Section 401(a)(3) B and (4) of the 1954 Code, which, in allowing an exempt status, permit the inclusion of officers if there is no discrimination in their favor is a two-edged sword. If there is no discrimination between the officers and other employees the Trusts do not violate the Act, but what if there is discrimination such as here where the only persons participating in the Pension Trust are the business representatives and the financial secretary—in fact coverage for menial employees is forbidden, and where the Union has the power to select whom it may choose for coverage in the Medical Trust and selects the business representatives, and in the case of Local 10 not only the business representatives but ex-business representative Roy Hill, and some clerical help, with the Unions empowered to give and in at least two instances, giving, a better deal to their officers than to clerical help, viz., making payments on an hourly basis rather than a flat fee (See Ex. 4, Article III (j) p. 6). This is a clear-cut case of discrimination and on the reasoning of the Eighth Circuit the Trusts violate the Act and are illegal.

Apart from the plain and unambiguous language that "employees of such employers . . . or . . . jointly with the employees of other employers making similar payments . . . ." means simply industry employees, cases interpreting the Act lead to the same conclusion. That the trustees, or at least the employee trustees, were representatives of employees and that the term

did not refer to "exclusive bargaining representatives" of employees, was enunciated by Judge Learned Hand and quoted with approval by the Supreme Court in *U. S.* v. *Ryan,* 350 U. S. 299, 76 S. Ct. 400, 100 L. Ed. 335 (1956):

> "We agree with Judge Hand that in using the term 'representative' Congress intended that it include any person authorized by the employees to act for them in dealing with their employers."

All cases subsequent thereto are in accord. We specifically call attention to two decisions of this Circuit:

Sheet Metal Contractors v. *Sheet Metal Workers,* 248 F.2d 307; Cert. denied 355 U.S. 924, 78 S. Ct. 367, and

Local No. 2 v. *Paramount Plastering,* 310 F.2d 179. Cert. denied 372 U.S. 944.

In *Sheet Metal* this court said at page 315:

> "It is said that the trustees were not representatives of employees because they were trustees of a welfare fund, and were not acting as representatives of either union or employees since they had fiduciary duties in connection with a trust fund. We think that a mere reading of §302 demonstrates the fallacy of any such position. If that section, as Essex suggests, means that 'trustees of a fund' are for that reason not representatives within the meaning of the Act, then part 5 of subdivision (c) was wholly unnecessary and all the careful statement of an exception found there would be wholly meaningless. For the exception does not follow from the mere fact that there are trustees of a fund, but the fund must be subject to

all the detailed limitations there stated. But the decision in United States v. Ryan brushed away all such narrow notions of the meaning of the term 'representatives' as that used in Essex."

We also refer the court to *Arroyo* v. *United States,* 359 U.S. 419, 3 L. Ed. (2) 915, 79 S. Ct. 864 (1959) which clearly holds that the Congress intended to define "with specificity" the lawful purposes of a Section 302 trust; to *U. S.* v. *Ryan,* 350 U.S. 299, 100 L. Ed. 335, 76 S. Ct. 400 (1956), which holds that any trust not coming under the express letter of the exception is "malum prohibitum"; to *Upholsterers' International* v. *Leathercraft Furniture,* 82 F. Supp. 570 (E.D. Pa. 1949) which approves the contention that a trust does not come within the exception unless it is for the "sole and exclusive benefit of employee members"; and to *U. S. Trucking Corporation* v. *Strong,* 239 F. Supp. 937. While *U. S. Trucking* v. *Strong,* supra, is a decision of a District Court, the reasoning of the court in holding a provision of a pension trust providing for participation by Union employees as well as employees of the industry was illegal is interesting and persuasive since it attacks the problem from a viewpoint different from that of most of the cases. The court called attention to the fact that collective bargaining becomes a snare and a delusion if the employer is allowed to sit on both sides of the bargaining table and that for the same reason a labor organization may not sit on both sides of a bargaining table if it be deemed an employer for the purpose of a pension trust. It must act solely for the industry employees it represents; for it to

act in its official capacity as an employer would present a conflict of interest. The court further concluded:

> "Under the facts here, the Union is acting as a labor organization and not as an employer.
>
> "Since the Union is a labor organization and not an employer for the purposes of Section 302 (c)(5), the exemption of Section 302 (c)(5) does not apply, and payments by the trucking company employers to the Pension Fund, and the receipt thereof by the Trustees, violate Section 302(a) and (b) ** * * It is conceded that the Pension Fund and its Trustees are, for the purposes of Section 302, 'representatives' of the trucking companies' employees. Indeed, the reasoning in Ryan and the holdings in the subsequent cases of Mechanical Contractors Ass'n of Philadelphia v. Local Union 420, 265 F.2d 607 (3rd Cir. 1959) and Local No. 2 of Operative Plasterers and Cement Masons Int'l Ass'n v. Paramount Plastering, Inc., 310 F.2d 179 (9th Cir. 1962) would require the Court to reach such a conclusion even if the issue were in dispute.
>
> "For the foregoing reasons, the Court holds that the Pension Fund does not come within the exemption of Section 302(c)(5) and therefore payments by employers to the Trustees of the Pension Fund violate Section 302(a). From the effective date of the judgment to be entered herein it shall be unlawful for the plaintiff to make payments to the Trustees or for the Trustees to accept such payments so long as the Union participates as an 'employer' in the Pension Fund." P. 941

And, finally, we believe the reasoning of Judge Harper in *Kroger* and *Townsend* and of Judge Kilkenny in the

instant case, is far more compelling than that of the Circuit Court for the Eighth Circuit.

The argument that Union business representatives and financial secretaries come from the rank and file membership of the Unions and therefore if there were no pensions no one would want to become a business representative is fallacious. In the first place an employee of the rank and file wants to become a business representative because it is a better job and not such hard work, and if the Union wishes to provide an incentive all Unions affiliated with the AFL-CIO can set up their own pension and medical trusts just as some other Unions do. The argument that there has been no abuse of the two trusts is questionable where we have Roy Hill covered long after his official status with Local 10 had been terminated and four business representatives occupying the status of both trustees and beneficiaries in both trusts. We quote from *Local No.* 2 v. *Paramount Plastering, supra,* at p. 186 and 191:

> "It is perfectly true, as the union contends, that there is not the slightest hint in the record that any of the trust funds here involved 'has resulted in bribes, kickbacks, slush funds, racketeering or union war chest; nor do [plaintiffs] assert that this fund is under the sole control of the union.' We accept that statement with gratitude and happiness that it is true. But that does not prove that the trust fund is 'not within the scope of the evil which Congress intended to eliminate.' We agree with appellees and Employing Plasterers' Association of Chicago v. Journeyman Plasterers'

Protective & Benevolent Society of Chicago, supra, wherein the court stated:

" 'Section 302 is aimed primarly at the *prevention* of possible abuse and not at providing a remedy for abuse actully perpetrated. * * * Where it is established that payment and acceptance is between employer and "representatives" of employees, the issue in a suit for injunction becomes the legality of the welfare funds *as measured by* the statutory standards of administration.' (279 F.2d at 97.) (Emphasis added.)" p. 186

"We do not quarrel in the slightest with the laudable objectives of the trust amicably created by labor and management in this case. We sympathize with the efforts of both labor and management to solve a vexing industry problem. But like so many of such present day problems, our duty is to rule in accordance with that which the Congress (quote) in its wisdom (end of quote) has seen fit to enact. We cannot widen the door when the door sill has been carefully tailored by the representatives in Congress. The relief sought by the appellants herein must be found in congressional and not judicial action." p. 191

The coverage of Union employees in a Pension and Medical Trust does not fall within the exception (c)(5) of the Act, particularly where coverage is at the whim of the Unions, is grossly discriminatory, and is devised for all practical purposes to benefit the Union officers who negotiated the Trust Indentures.

II

The District Court did not err in finding that the practice of extending certain benefits to retired employees by the Trustees of the Medical Trust violated Section 302 of the Labor Managment Relations Act of 1947

and

Did not err in finding (R. 80, 1.15-20) that the benefits presently paid to retirees are provided for by extra assessments now being paid by employers.

Appellants have treated their Specification of Error 3 under the converse of the first of the above headings as II and their Specification of Error 4 under a separate subsequent converse heading denominated III. We will treat both of these specifications together and deem a further review of the factual situation necessary.

As heretofore stated, coverage for retirees was first provided June 1, 1958, Defend. Ex. 24, and we have heretofore pointed out that in our opinion this coverage and all subsequent coverage was unauthorized and null and void. If this court agrees with us, that is the end of the subject, but if the court believes that it is obligated to render an opinion on the actual practice now being followed by the Medical Trust, as illustrated by the rider, Defend. Ex. 24, it is necessary to consider further facts relative to this coverage. The amount of the payment to the insurance company to provide the cost of covering retired employees and their wives was obtained by figuring what the cost would be for these retirees: 61 in 1962, Ex. 26, 57 retired men and 35

cost of coverage after retirement. Now the Unions say that the test is solely whether the retiree was a *participant in the Plan prior to retirement* and that whether or not a portion of the payments made to the trust while the retiree was actively employed was or was not in contemplation of providing coverage after his retirement is immaterial. Certainly under all the labor agreements before this court: Ex. 1; Dedend. Ex. 4, dated February 1, 1956; Defend. Ex. 3, dated January 19, 1959; the Trust Indentures, Ex. 4; Defend. Ex. 8, dated March 20, 1957; and amendment thereto dated March 20, 1957, there is not the slightest indication that present contributions were to be made to provide a fund for medical care of active employees on their retirement. We believe that the distinction between a medical trust whereby contributions are made by present industry employers for present industry employees to create a fund to provide medical care of the employees when they retire is far different from the situation where we have a medical trust providing for medical coverage for active industry employees only and superimposed thereon is a practice of covering retired employees. But we have a surplus sufficient to take care, as least to a limited extent, of the medical needs of retirees, so why not provide at least limited coverage, particularly since the cost thereof amounts to only $1.517 per month for 1964 as against $13.883 for active employees? The answer, of course, is that the Contract and Trusts provide for no such coverage, and the surplus is intended to protect the active employees from rising medical costs, and if excessive, the benefits to active employees should be increased. The

line of argument thus adopted by the Unions takes care of the objection that the retirees would not fall within the definition of employees of employers set forth in the Act, but certainly it is not applicable under the factual situation as found by the trial court in this case.

It is possible that this court will believe that the factual situation on which the trial court based its conclusion of law, namely, present payment by employers for the benefit of retired former employees was illegal because at the time of payment the beneficiaries were not employees, and the situation where employers create a trust fund not only for the benefit of the present active employees but also for the benefit of these same employees on their retirement so that they are employees at the time payment is made is a "distinction without a difference." In any event it is true that in *Blassie* coverage was extended to retirees in June 1957, although the original trust was created in 1953 and that in *Townsend* the trust was created for the sole purpose of providing medical care for employees on retirement.

If this court believes there is no distinction the question then resolves itself into whether to follow the reasoning of Judge Harper or that of the Eighth Circuit which in effect is a holding that the word "employees" should be interpreted as including "former employees." To us the reasoning of Judge Harper is compelling, the reasoning of the Circuit Court a strained construction in order to achieve what that court conceives is a desirable effect.

We have heretofore mentioned that we were not im-

pressed with reference to the Internal Revenue Code and regulations made thereunder, particularly the exemptions of the Trusts from taxation as heretofore in this brief discussed, and have pointed out that the Medical Trust does not treat the officers of the Unions and the menial employees equally but is discriminatory in favor of the officers. As to the reference in the brief for Amalgamated Meat Cutters to the 1962 amendment to Section 401 of the Internal Revenue Code of 1954, it is noteworthy that the provisions for medical benefits for retired employees is tied in with a pension and annuity plan and not with provisions for medical and hospital care. Further, it provides for something that will occur in the future, namely, payment into a fund for the benefit of present employees to become effective on their retirement. Moreover, a statute dealing with tax exemptions is a civil statute and it is irrelevant to the interpretation of a criminal statute. Even if it were proper to consider a later civil statute as aid to interpreting a prior criminal statute, the amendment to Section 401 of the Internal Revenue Code by the Act of 1962 merely states that a pension or annuity plan may provide for the payment of medical benefits on retirement and only relates to determining whether contributions thereto may be deducted for income tax purposes.

Appellants' contentions when extended to their logical conclusions mean that any purpose beneficial to employees, present or past, would be proper so long as the management thereof is vested equally in employers and employees. If this were the case there would have been no point in the enumeration of specific purposes

which was so carefully included in the Act, particularly considering the fact that the Act is a criminal statute which must be strictly read and construed. Even in 1959 when the Act was amended to include a sixth category, pooling vacations, holidays, severance, etc., there was no wide enlargement of the permitted activities. With particular reference to retired employees the Act as written can only be read that retired employees do not fall within the specific exceptions mentioned, and that it is ridiculous to refer to subsequent legislation as showing the intent of Congress in 1947 when the language used is plain and unequivocal.

III

Claimed error in finding that payments into either Trust by Appellee would be a criminal offense

The above is Specification of Error 5 and is treated by appellants under IV.

As far as the finding that appellee would be guilty of a criminal offense in making payments to the two trusts is concerned appellee had been warned that he would be committing an illegal act and this was the basis of absolving him from payment. See

Employing Plasterers v. Journeymen Plasterers, 279 F.2d 92 (Seventh Circuit 1960).

International Longshoremens v. Seatrain Lines, 326 F.2d 916 (Second Circuit 1964).

Mechanical Contractors v. Local Union 420, 265 F.2d 607 (Third Circuit 1959).

Substantial penalties are involved: a $10,000.00 fine or imprisonment for one year, or both.

payment of the requisite fees therefor. The second point is that in the event the court holds that appellants or any of them are entitled to recover on their counterclaim they cannot recover in addition to the principal amount 10% of this amount due as liquidated damages, as liquidated damages are only allowed when the actual damages are uncertain or difficult to ascertain and never as a penalty in addition to the actual damages sustained. See *Yuen Suey* v. *Fleshman,* 65 Or. 606, 133 P. 803.

On the question of coverage for retirees we again emphasize that this court should not follow the beckoning of appellants and embark on a judicial excursion in a sea of abstract principles but should simply hold that the practice of covering retirees was unauthorized. However, if the court believes that it should determine the legality of coverage its decision should be based on the factual situation as found by the trial court and the practice held illegal. Finally, if this court believes that there is no difference in principle between this case and *Blassie,* the reasoning of Judge Harper should be followed. In any event the holding in *Townsend* should be no authority since there we have the situation where present contributions are being made on behalf of active employees to provide a fund for one specific purpose: to provide medical benefits for these employees after retirement.

We represent an individual with limited resources and as a result this brief is meager as opposed to the plethora of briefs by amici curiae which we simply cannot answer—in fact this brief is largely taken from the

brief presented to the trial court. We suggest that in the event the judgment herein is upheld either wholly or in part, since we are determining the validity of a trust, the trustees, who are only interested in determining what is legal as distinguished from what is illegal should be required to pay an attorney's fee for appellee.

Respectfully submitted,

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I certify that in connection with the preparation of this brief I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion the foregoing brief is in full compliance with those rules.

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